Supreme Court, U.S.
FILED
FEB 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1063

In the Supreme Court of the United States

OCTOBER TERM, 1985

LIZZA INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the courts below erred in ordering criminal forfeiture, pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), Tit. IX, 18 U.S.C. 1961 *et seq.*, of "gross" rather than "net" profits derived from racketeering activity. Petitioner also contends that the forfeiture should be limited to the specific receipts supporting the predicate mail fraud counts of the indictment, rather than the total gross profits derived from the racketeering activity.

1. After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of use or investment of income derived from racketeering, in violation of 18 U.S.C. 1962(a), and 32 counts charging mail fraud, in violation of 18 U.S.C. 1341. The corporation was fined $20,000 on the racketeering count and $1,000 on each mail fraud count, for a total fine

of $52,000; it was also ordered to forfeit $1,000,000, pursuant to 18 U.S.C. 1963(a)(1). The court of appeals affirmed (Pet. App. 1a-14a).[1]

The evidence at trial, which is not in dispute, established that petitioner, a Long Island construction firm, was involved in and benefitted from a bid-rigging conspiracy involving three contracts to repair and resurface county and state roads on Long Island. The district court ruled that it would impose a criminal forfeiture, pursuant to RICO, based on petitioner's "gross" racketeering profits—the payments received by petitioner under the fraudulently obtained contracts less the costs directly attributable to performance of the contracts. The court refused petitioner's request that forfeiture be limited to "net" profits—gross profits less general overhead, business expenses, and taxes. Petitioner, preserving its objection to the court's calculation method, stipulated with the government that the forfeitable profit under the court's formula totalled $1 million, and the district court ordered forfeiture of that sum.

On appeal, the court of appeals affirmed the district court's formula for determining forfeitable profits (Pet. App. 9a-13a). The court held that the district court's method of computing the forfeiture "is consistent with the purposes of the RICO statute" (*id.* at 11a). It observed (*id.* at 12a) that Congress intended to punish and deter organized criminal activity by removing the potential for economic gain and that Congress specifically directed that

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[1]An earlier trial resulted in a mistrial when the jury was unable to reach a verdict. At the second trial, the jury acquitted petitioner on four mail fraud counts. The jury also convicted co-defendant Herbert Hochreiter, president and part-owner of petitioner Lizza Industries, Inc., of racketeering, 32 counts of mail fraud, and one count charging perjury, in violation of 18 U.S.C. 1623. The court of appeals affirmed Hochreiter's convictions as well.

RICO's remedial provisions should be " 'liberally construed' " (Pub. L. No. 91-452, § 904(a), 84 Stat. 947). One judge dissented on the ground that the district court should have taken into account taxes already paid to the government on the forfeited profit.

3. The court of appeals' decision is correct, it does not conflict with any decision of this Court or another court of appeals,[2] and it presents an issue of vanishing importance in light of the 1984 amendments to the statute. Accordingly, further review is unwarranted.

The applicable RICO provisions require forfeiture of "any interest acquired * * * in violation of section 1962." 18 U.S.C. 1963(a)(1). This Court ruled in *Russello* v. *United States*, 464 U.S. 16 (1983), that those provisions permit the forfeiture of profits or proceeds from racketeering activity.[3] It observed that Congress plainly intended to

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[2]Petitioner suggests (Pet. 8 n.7) that had the Seventh Circuit reached the issue in *United States* v. *Ginsburg*, 773 F.2d 798 (1985) (en banc), petition for cert. pending, No. 85-840, it would "undoubtedly" have ruled contrary to the decision below. Such speculation is, of course, not sufficient to establish an actual conflict warranting this Court's review. In addition, petitioner's predictions find no support in the Seventh Circuit's decision. The court of appeals affirmed a district court order allowing reduction of the forfeiture in light of the defendant's future restitution; however, neither the court of appeals nor the district court intimated that the forfeiture should be reduced in light of indirect costs incurred by the defendant. To the contrary, the court ordered defendant to forfeit his one-half share of the firm's fraudulently obtained legal fees, providing no deductions for overhead expenses incurred by the firm or income taxes paid by the defendant.

[3]In that case, the petitioner arranged for arsonists to burn part of an office building and then submitted fraudulent insurance claims seeking compensation for the fire. This Court affirmed a forfeiture of $340,043.09, the total sum paid to the petitioner by the insurer. The forfeited sum included $30,000 that the petitioner later paid to an insurance adjuster to inflate the damage assessment and secure the highest payments possible. See 464 U.S. at 17-20.

reduce the economic power and influence of organized crime by "separating the racketeer from his dishonest gains" (*id.* at 28). The Court also noted that Congress intended the forfeiture provisions to "punish" and "deter" organized criminal activity (*ibid.*).

The court of appeals' use of gross profits to determine petitioner's forfeitable interest is fully consistent with the RICO forfeiture provisions and the *Rusello* decision. Congress plainly held no intention that RICO forfeiture proceedings should require application of complex and arduous accounting techniques to "ensure that a convicted racketeer is not deprived of a single farthing more than his criminal acts produced" (Pet. App. 12a). Application of a "net" profit formula—requiring speculative assessment of the racketeer's overhead, indirect costs, and perhaps even allowable perquisites—would impose needless and difficult burdens on the government and the courts. Cf. *United States* v. *Ginsburg*, 773 F.2d 798, 802-803 (7th Cir. 1985) (en banc).

In all events, further review of the issue is unwarranted in light of recent amendments to the RICO forfeiture provisions. See Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 302, 2301(a)-(c), 98 Stat. 2040, 2192. Section 1963(a)(3), as amended, now clearly states that the convicted racketeer must forfeit "proceeds * * * obtained directly or indirectly" from the illegal activity (98 Stat. 2040). The Senate Report specifically notes that "the term 'proceeds' has been used in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving net profits. It should not be necessary for the prosecutor to prove what the defendant's overhead expenses were" (S. Rep. 98-225, 98th Cong., 1st Sess. 199 (1983)). In addition, Section 1963(a) now authorizes a fine of up to twice the amount of any "gross profits or other proceeds"

(98 Stat. 2192). These amendments dispel any future contentions that RICO's forfeiture provisions can reach only a racketeer's net profits.

Petitioner also argues (Pet. 8-9) that the court improperly ordered forfeiture of the total profits received on the three fraudulent contracts. Petitioner contends that the forfeiture should be limited to only those receipts that were described in the mail fraud counts of the indictment. This issue, which petitioner apparently failed to raise in the district court, is plainly meritless. Petitioner errs in contending (Pet. 9) that the payments described in the mail fraud counts represent "the only income that [petitioner] actually received through racketeering." The mail fraud counts describe only those payments that were sent through the mails during the applicable limitations period. Petitioner received additional money from the fraudulent scheme; indeed, petitioner conceded by stipulation that its gross profits from the three contracts totalled approximately $1 million (Pet. App. 5a). Petitioner cannot dispute that admission at this juncture.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

DOJ-1986-02